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IN THE

Supreme Court of the United States

October Term, 1966

No. 581

CHARLES E. WILLIAMS,
Petitioner,

v.

HOT SHOPPES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES E. WILLIAMS,
1329 Shepherd Street, N.W.
Washington, D.C. 20011
Petitioner, *Pro se*

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IN THE

Supreme Court of the United States

October Term, 1966

No. 586

CHARLES E. WILLIAMS,
Petitioner,

v.

HOT SHOPPES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Charles E. Williams, petitioner, prays that a writ of certiorari issue to review a judgment entered May 19, 1966, by the United States Court of Appeals for the District of Columbia Circuit upon which a petition for rehearing was denied June 22, 1966.

OPINIONS BELOW

The District Court filed no opinion or findings and conclusions. The Court of Appeals filed no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered May 19, 1966. (App. A, *infra.*) A timely petition for rehearing was filed June 3, 1966, and denied June 22, 1966. (App. B, *infra.*) Application to the Chief Justice of the United States to extend time for filing petition for certiorari to September 22, 1966, was timely made September 20, 1966, and granted September 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Was the benefit of Rule 60(b) of the Federal Rules properly denied to the petitioner whose action for damages, pending on remand from the Court of Appeals for further proceedings, was dismissed for want of prosecution because of petitioner's failure, in good faith, to put the case on the ready calendar?

STATUTES AND RULES INVOLVED

Rule 1 and Rule 60(b), Rules of Civil Procedure for the United States District Courts, 28 U.S.C. Appendix, pp. 6079, 6139 (1964 ed.), printed *infra* as Appendix C, pp. 2-3; and Rule 11 and Rule 13, Local Civil Rules, United States District Court for the District of Columbia, Appendix D, *infra*, pp. .

STATEMENT OF THE CASE

This case arose out of the racial exclusion of the petitioner-invitee from a public restaurant operated by the wholly-owned subsidiary of the respondent in Alexandria, Virginia, November 5, 1959. Damages were claimed. Jurisdiction was invoked under 28 U.S.C. § § 1343(1), 1343(3), 1355, and 42 U.S.C. § 1983.

After two appeals, involving the sufficiency of the complaint,[1] pretrial proceedings were taken (JA-1) * on the amended complaint in which recovery was claimed for the deprivation of federal rights by the enforcement of restaurant segregation by state officers.[2] (JA-4)

The admissions on file establish that the respondent excluded petitioner from its restaurant in Alexandria — a community historically committed in 1959 to the state custom of compulsory racial segregation — in response to the requirements of state officials and to avoid involvement with them over the matter of integrated dining. Otherwise, the respondent — then accommodating Negroes on a first come first served basis at other Hot Shoppes facilities in the general area — would have admitted petitioner to the Alexandria restaurant. (JA-7)[3]

Petitioner served additional interrogatories on respondent February 4, 1964, to clarify earlier responses. After waiting five months for the objections to be heard,

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[1] *Williams v. Hot Shoppes, Inc.*, 110 U.S. App. D.C. 358, 293 F.2d 835 (1961), *cert. denied*, 370 U.S. 925 (1962).

[2] Bazelon and Edgerton, JJ., dissenting, 110 U.S. App. D.C. at 369, 293 F.2d at 846, stated: "If appellee was required by State officials acting 'under color of law' to segregate its facilities or to exclude Negroes, its conduct was likewise State action and 'under color of law.' * * * And if these officials, acting by virtue of their office and purportedly pursuant to State law, by their conduct led appellee to understand and believe in good faith that it was required by law to exclude Negroes, then the appellee's action in excluding the appellant is attributable to the State."

* Joint Appendix filed in and certified by the Court of Appeals.

[3] It is also admitted that respondent subjected petitioner to the discrimination of business competitors in accordance with a state-wide trade association policy and understanding. This raised the question of whether injury occasioned by concerted action to refuse business dealings was redressable under state law, in theory or practice, and thus under federal law, 42 U.S.C.A. § 1988, which incorporates state remedies.

petitioner sought a summary judgment on the question of liability based on the admissions. The motion was denied October 20, 1964, and a motion to vacate the order was denied November 9, 1964. Appellate review was refused January 12, 1965.

Notice that the action had been dismissed under Local Rule 13 for want of prosecution was issued October 18, 1965. (JA-14) The motion to reinstate the action, filed three days later, was denied by order entered December 8, 1965, (JA-17) upon recommendation of the Assistant Pretrial Examiner. (JA-14)

The motion and objection to the recommendation against reinstatement were supported by an affidavit showing petitioner's noncompliance with Local Rule 11(d) had resulted from honest mistake, inadvertence, or excusable neglect. (JA-15) No counter-affidavits or other disputing evidence were presented.

It appeared that the respondent had consciously acquiesed in the delay in bringing the case to trial.[4] The identical question for determination had been pending in this Court during 1963 and 1964 in the "sit-in" cases. Petitioner and, presumably, the respondent, anticipated that the final disposition of the Virginia "sit-in" cases[5] would have a direct bearing upon the final settlement of this action, particularly, since the *Briefs & Records* in this Court, relating to those cases, rather convincingly showed that the lunch counter discrimination had been in-

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[4] A long standing rule in the Circuit is that after the issue has been joined, the defendant has it in his power to prevent unnecessary or unusual delay; and by the use of ordinary diligence the defendant can force the case to call for trial and its dismissal upon default of the plaintiff. *Meloy v. Keenan*, 17 App. D.C. 235, 237 (1900).

[5] *Randolph v. Virginia* (and the *Henry*, *Thompson*, and *Wood* cases), 374 U.S. 97, 98, 99, 100 (1963); *Green v. Virginia* and *Harris v. Virginia*, 378 U.S. 550, 552 (1964).

duced and required by the enforcement of the state custom of compulsory racial segregation in Virginia.[6]

The significant reason for petitioner's misapprehension of the requirement to put the case on the ready calendar was the practice instituted in 1959, under Local Civil Rule 11(h), whereby every case on the general calendar is called, with written notice to the parties, twice a year. And if a party fails to certify the case to the ready calendar within six months after the call, or within the time determined by the pre-trial examiner, his action is dismissed, with or without the 30-day warning notice, under Local Rule 13.

However, the records show that this case was never called but dismissed, without notice, despite the practice of the Clerk's office to give a 30-day warning as a matter of courtesy.

The Court of Appeals affirmed per curiam the denial of reinstatement without opinion. (Appendix A.)

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the District of Columbia Circuit, in this case, is in direct conflict with a decision of the Fifth Circuit. *Woodham v. American Cystoscope Co.*, 335 F.2d 551 (1964).

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[6] Despite the absence of an explicit statute, ordinance or regulation requiring segregated eating facilities in Virginia, this Court, nevertheless, vacated the judgments and remanded the Virginia "sit-in" cases to the Supreme Court of Appeals of Virginia for "reconsideration" in light of the Court's decisions in the South Carolina and Florida cases where separate eating facilities had been required by ordinance and health regulations. *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Robinson v. Florida*, 378 U.S. 153 (1964).

Finally, all of the Virginia lunch counter "sit-in" cases were finally dismissed by the Virginia Supreme Court of Appeals on October 14, 1965, on the basis of *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), authorizing abatement of such cases in view of the enactment of Title II of the Civil Rights Act of 1964.

In *Woodham*, the District Court dismissed the action under a court rule, similar to Local Rule 13, because of the lawyer's noncompliance with a local rule of which he was unaware despite his obligation to know the rules of practice. The Fifth Circuit held that, in the absence of a willful violation of the local rule, the dismissal constituted an over-rigorous, drastic, punitive sanction which blunts Rule 1 of the Federal Rules of Civil Procedure.

The Fifth Circuit appears to insist upon affording the escape hatch of Rule 60(b) to defaulting parties "except upon a serious showing of willful default"[7] because "the right to be heard is one of the fundamental rights of due process of law" and thus any doubt concerning the motion to reinstate should be resolved in favor of a trial on the merits.[8]

For the same reason, the decision below conflicts with the Tenth Circuit's *Patterson v. C.I.T. Corp.*, 352 F.2d 333 (1965). It conflicts, apparently, with *Cavalliotis v. Salomon*, 357 F.2d 157 (2d Cir. 1966). In *Cavalliotis*, the Second Circuit upheld the reinstatement of an action dismissed for want of prosecution after notice by the Clerk, which was sent to the wrong address, even though notice had been given by publication in the *New York Law Journal* in accordance with Rule 23, General Rules of the U.S. District Court for the Southern District of New York.

2. In 1962, this Court settled the question of the power of district courts to impose the sanction of dismissal for deliberate misconduct. *Link v. Wabash R. Co.*, 370 U.S. 626. However, the Court did not reach the question

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[7] *B. F. Goodrich Tire Co. v. Lyster*, 328 F.2d 411, 416 (1964).

[8] *Council of Federated Organizations v. Mize*, 339 F.2d 898, 901 (1964).

of the conditions under which the sanction could be mitigated under Rule 60(b). 370 U.S. at 632.[9]

In the absence of a fixed standard, the provisions of Rule 60(b) appears generally available to relieve litigants who default in good faith as is indicated by the decisions of the Second, Fifth, Ninth, and Tenth Circuits.

But the general reluctance of the eighteen district judges in the D.C. Circuit to revise the recommendations of pretrial examiners, and the further reluctance of Court of Appeals panels to upset the exercise of discretion by the District Court, have led to incongruous results whereby gross negligence is excusable, on one hand, and good faith noncompliance with a court rule is held inexcusable on the other. This is illustrated by the result reached in this action and that reached in *L. P. Steuart, Inc. v. Matthews*, 117 U.S. App. D.C. 279, 329 F.2d 234, *cert. denied*, 379 U.S. 824 (1964).

The practice in the D.C. Circuit which permits refusal of reinstatement of the instant case and, at the same time, allows another to be twice reinstated, without a showing of good faith noncompliance by affidavit or other proof either time, appears arbitrary and inequitable.[10]

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[9] The sanction has since been upheld in cases of callous inattention, flagrant and deliberate disobedience of court orders, as well as calculated maneuver to obtain improper advantage, e.g., *Maddox v. Shroyer*, 112 U.S. App. D.C. 318, 302 F.2d 903, *cert. denied*, 371 U.S. 825 (1962); *Taub v. Hale*, 355 F.2d 201 (2d Cir.), *cert. denied*, 384 U.S. 1007 (1966); *Thorn v. Harrisburg Trust Co.*, 330 F.2d 3 (3rd Cir. 1964), *cert. denied*, 379 U.S. 646 (1965); *Esteva v. House of Seagram, Inc.*, 314 F.2d 827 (7th Cir.), *cert. denied*, 375 U.S. 826 (1963); *Grunewald v. Missouri Pacific R. Co.*, 331 F.2d 983 (8th Cir. 1964); and *Pearson v. Dennison*, 353 F.2d 24, 29 (9th Cir. 1965).

[10] To illustrate: The Assistant Pretrial Examiner, who is not a lawyer, recommended against reinstatement of this action. The case, *Flood v. George Washington Hospital*, Civil Action No. 2706-63, now pending, was filed November 5, 1963, and answered November 22, 1963. The plaintiff had to be compelled

Unless the conflict is resolved, litigants in the District of Columbia Circuit who have become subject to the sanction of dismissal because of a good faith default will be treated differently from the vast number of litigants similarly situated in the Fifth and other Circuits. Such an inequity constitutes a deprivation of equal protection as well as of property[11] without due process of law.

3. The attainment of desirable uniformity and continuity of decision within the District of Columbia Circuit in the near future appears improbable in view of the differing views of the panels and individual Circuit judges on the question of what constitutes "mistake, inadvertence, suprise, or excusable neglect," under subsection (1), or "any other reason justifying relief," under subsection (6) of Rule 60(b).[12] A uniform construction of

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to respond to interrogatories and then compelled to give more definite answers by court orders. The case, dismissed June 15, 1965, was reinstated October 26, 1965, upon the excuse that counsel had inadvertently overlooked the 30-day warning notice. (No such notice was given in the instant case.) The assertion of inadvertence was unsupported by testimony, *ex parte* or otherwise, but counsel promised diligent prosecution if the action were reinstated. The case was again dismissed May 2, 1966, and reinstated a second time upon recommendation of the Pretrial Examiner, a lawyer, without proof of excusable neglect, presumably, to protect counsel from liability to his client. The recommendation was approved by the court August 11, 1966. Although the reinstatement under these circumstances appears not to accord with this Court's *Link* decision, it is not unlike the discretion exercised, *e.g.*, in *Dyotherm Corp. v. Turbo Machine Co.*, ____ F. Supp. ____, 10 FR Serv. 2d 60b.29, Case 3 (E.D. Pa. 1966).

[11] "A vested right of action is property in the same sense in which tangible things are property and is equally protected." *Pritchard v. Norton*, 106 U.S. 124, 132 (1882).

[12] For example, Edgerton and Prettyman, JJ., view the catch-all clause of Rule 60(b)(6) as broad enough to permit reinstatement where the gross negligence of counsel is inexcusable under subsection (1). *L. P. Steuart Co., supra.* Danaher, Bastian, and Wright, JJ., say that mistake is not enough to obtain

Rule 60(b) seems required by Fifth Amendment due process in order to secure the equal treatment of litigants in the D.C. Circuit who apply for Rule 60(b) relief.

4. This case thus presents an important question concerning the application of Rule 60(b) of the Federal Rules of Civil Procedure. As such, the case involves the essential purpose of the Court to secure uniformity of judgments arising out of the construction of the Federal Rules. Moreover, it involves the due process conditions under which the federal right to litigate in the courts of the United States may be abrogated by court rules designed to facilitate the effective administration of judicial business. Application is thus made for the exercise by this Court of its supervisory power to define the standards under which the relief provisions of Rule 60(b) shall be applied to litigants who default in good faith.

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relief under the catch-all clause, that a showing of "extraordinary circumstances" is required. *Boehm v. Office of Alien Property*, 120 U.S. App. D.C. 100, 344 F.2d 194 (1965). Edgerton, Prettyman, and Fahy, JJ., would excuse illness of counsel, *L. P. Steuart Co., supra*, and *Rankin v, Shayne Bros., Inc.*, 108 U.S. App. D.C. 47, 280 F.2d 55 (1960). Danaher, J., dissenting in *Rankin*, would not. He thinks the party should secure other counsel. Fahy and Prettyman, JJ., say that prejudice to the defendant must be factually supported. *Rankin, ibid.* Miller, J., dissenting in *L. P. Steuart*, said prejudice to defendant was self evident. Apparently, McGowan and Tamm, JJ., agreed with him on this point in the instant case. Fahy and Prettyman, JJ., hold that the District Court may not dismiss for want of prosecution a case remanded for further proceedings without first taking steps, such as referral to the Assignment Commissioner and call, to initiate compliance with the Court of Appeals' mandate. *Rankin, supra.* Miller, McGowan, and Tamm, apparently took the opposite view in the instant case. Miller, J., dissenting in *L. P. Steuart*, believes this Court, in *Link*, overruled the prior liberal view of the D.C. Circuit.

CONCLUSION

Petitioner respectfully submits that the petition for review by certiorari should be granted in view of the clear conflict among the United States Courts of Appeals and the public importance of the question presented. Accordingly, petitioner prays this petition be granted.

Respectfully submitted,

CHARLES E. WILLIAMS

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Petitioner, *Pro se*.

APPENDIX A

[Filed May 19, 1966]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 19,954 September Term, 1965.

Charles E. Williams,
Appellant,

v.

Hot Shoppes, Inc.,
Appellee.

Civil 3332-59

Appeal from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Senior Circuit Judge, and McGowan and Tamm, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that each party bear his own costs on this appeal.

Per Curiam

Dated: May 19, 1966.

APPENDIX B

[Filed June 22, 1966]

ORDER

On consideration of appellant's petition for rehearing and appellee's opposition thereto, it is

ORDERED by the court that appellant's aforesaid petition is denied.

Per Curiam.

APPENDIX C

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
28 U.S.C. Appendix, pp. 6079, 6139

RULE 1 — Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

RULE 60. — Relief from Judgment or Order

a. Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the

appeal is pending may be so corrected with leave of the appellate court.

b. Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX D

RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Local Civil Rules

Rule 11. Calendaring and Assignment of Actions; Certificate of Readiness; Call of the Civil Calendar; Assignment Commissioner, etc.

(a) *General Calendar.* There shall be a general calendar, so kept as to distinguish between "jury" and "non-jury" actions.

(b) An action shall be calendared by the Clerk as soon as it is at issue. He shall give notice thereof to all parties.

(c) *Action from the District of Columbia Court of General Sessions.* An action certified from the District of Columbia Court of General Sessions on a plea of title may be placed on the general calendar without further pleadings if the filing fees are paid. [Amended Dec. 6, 1963.]

(d) *Certificate of Readiness.* After a civil action is at issue and placed on the general calendar, any party thereto not in default may file and serve a certificate of readiness. Such certificate shall constitute a representation that all discovery has been completed and that the case is actually ready for trial. Within ten days thereafter any other party to the action may file objections to the certificate of readiness. If no objections are filed within ten days, the action shall be placed on the Ready Calendar. If objections are filed within said period, the party objecting shall at the same time provide and deliver to the Clerk a motions card calendaring same. In the event no motions card is provided at the time objections are tendered for filing, the Clerk shall refuse to accept the objections for filing. If the Motions Court overrules

the objections, the action shall be placed on the Ready Calendar. If the Motions Court sustains the objections, the action shall not be placed on the Ready Calendar, but in that event another certificate of readiness may be filed by any party at a later date, and such certificate shall be subject to the same procedure.

(e) *Ready Calendar.* There shall be prepared and maintained by the Assignment Commissioner a Ready Calendar. Every civil action in which a certificate of readiness has been filed shall be placed on the Ready Calendar ten days after the filing of the certificate, if no objection has been filed thereto. If objections have been filed to the certificate within said ten-day period, then the action shall be placed on the Ready Calendar if and when the objections are overruled by Motions Court.

(f) Except motions for a continuance or advancement of trial date, or for judgment, other than for summary judgment, no motion may be filed or accepted by the Clerk for filing in any civil action after it is placed on the ready calendar except by leave of the pretrial judge who may grant the same only upon showing of extraordinary circumstances arising subsequent to the filing of certificates of readiness, and only on five days' notice to all parties. Neither the granting of such motions nor the taking of depositions noticed after the filing certificate of readiness shall operate to delay pretrial or trial. The provisions of this Rule shall apply to all caveat proceedings after issues have been framed therein.

(g) The filing of a suggestion of death, or of bankruptcy, (see Rule 56(b) of these Rules), by any party to an action on the ready calendar shall operate to restore the action to the general calendar.

(h) *Call of the Civil Calendar.* There will be a call of all civil jury and civil non-jury cases on the general calendar during May and October in each year, or such other time as the Court may direct. If a party fails to

respond to the call, the Court may act as in case of failure to respond for trial.

(i) *Assignment of Case to Judge.* When a judge is ready to begin a trial, the Assignment Commissioner will, if it be practicable, send to his court the next action on the daily assignment, having regard to whether it be a "jury" or "non-jury" court.

(j) *Calendaring; Assignment.* One judge of this court shall at all times be designated to serve as the Assignment Judge. The calendaring and assignment of all actions, civil and criminal, shall be under the direction of the Assignment Judge, who will determine all questions concerning such matters. Motions to advance any case for trial shall be referred to the Assignment Judge but any other judge in disposing of any other aspect of any civil case may advance it for trial.

(k) All jury cases which have been pre-tried but which have not as yet appeared on the daily assignment, may be assigned to a Judge for the purpose of discussing the question of settlement if counsel for all parties agree to the negotiation conference, provided, however, that said conference shall not interfere with the trial date of the case. Should any such case be reached for trial before said negotiation conference is held, such conference shall be expedited so as not to interfere with the trial of the case.

(l) *Trial Attorney; Designation of.* Where more than one attorney represents a party one shall be designated as trial attorney when the action is placed on the ready calendar.

Rule 13. Dismissal for Failure to Prosecute.

(a) *Dismissal Without Prejudice; Notice of; Warning.* If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his

claim, or to avail of a right arising through the default or failure of an adverse party, or take other action looking to the prosecution of his claim, or to file a certificate of readiness under Rule 11(d) within six months of the date the action is called on the call of the civil calendar, the complaint, counterclaim, or third party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry. One month prior to the termination of the six month period the Clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making an entry in the docket of the mailing.

(b) *Failure to Warn; Effect.* A failure of the Clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule.

(c) *Action from District of Columbia Court of General Sessions; Failure to Pay Filing Fee.* If the plaintiff in an action certified from the District of Columbia Court of General Sessions on a plea of title fails to pay the filing fee within ten days from approval by the District of Columbia Court of General Sessions of the undertaking required by Title 11, Section 738 of the District of Columbia Code (1961) [Title 16, Section 1504 (1964)], the defendant may pay the same and move to have the action dismissed. [Amended Dec. 6, 1963.]

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CHARLES E. WILLIAMS, *Petitioner*

v.

HOT SHOPPES, INC. *Respondent*

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 586

CHARLES E. WILLIAMS, *Petitioner*

v.

HOT SHOPPES, INC. *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Court of Appeals filed no opinion. The District Court adopted the following recommendation of the Pretrial Examiner (JA 14):

> "Upon consideration of plaintiff's motion to vacate the dismissal by the Clerk under Local Rule 13, the opposition thereto, and the entire record herein, and it appearing that plaintiff failed for more than six months to take any action looking to the prosecution of his claim, and the Examiner finding that plaintiff has failed to show

mistake, inadvertence, surprise or excusable neglect such as would justify reinstatement, it is this 5th day of November, 1965,

"RECOMMENDED That said motion to re-instate be denied."

JURISDICTION AND STATUTE INVOLVED

Jurisdiction and the Statute and rules involved are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Did the pre-trial examiner of the United States District Court for the District of Columbia and the United States District Court for the District of Columbia abuse their discretion in refusing to reinstate petitioner's case, following his failure to abide by the rules of the District Court?

2. Was the United States Court of Appeals for the District of Columbia in error in refusing to reverse the decision of the District Court on a question involving:

(a) the local rules of the District Court.

(b) the discretion of the District Court.

STATEMENT OF THE CASE

The gist of Petitioner's case may fairly be summarized as follows:

On November 5, 1959, Petitioner entered a restaurant in Alexandria, Virginia. The restaurant manager "fearing prosecution and in an attempt to avoid it" refused to serve him. Further, Defendant's manager disavowed private prejudice on his part and on the part of defendant and said, in effect, he was excluding Petitioner only because of Virginia law and the custom and usage of the community. Petitioner's conclusion is that

> because the restaurant did what it did not of its own free will but because of pressure from the State, its actions were no longer private corporate actions but had somehow become actions of the State, unconstitutional under the Fourteenth Amendment and unlawful under 42 U.S.C. § 1983.

Having filed an Amended Complaint in June of 1961, Petitioner served interrogatories and requests for admissions on Respondent sporadically from June 15, 1961, to February 4, 1964. He followed this on July 13, 1964, with a Motion for Summary Judgment, moved to vacate an adverse ruling on that motion on October 23, 1964, and when that motion was denied, took no further action whatsoever until one year later when, on October 21, 1965, he moved to vacate the order of dismissal under Rule 13 of the Rules of the United States District Court for the District of Columbia.

Petitioner, a member of the Bar of all Courts concerned, has let this case creep along below for years, and the dismissal under Rule 13 of the Rules of the United States District Court for the District of Columbia was within the sound discretion of the District Court.

REASONS FOR DENYING THE PETITION

I

Petitioner Is an Experienced Attorney

Petitioner is an attorney with the Internal Revenue Service and has been since 1957 (JA 15). In the present case alone he has:

(1) filed a complaint;

(2) filed a brief opposing a motion to dismiss;

(3) filed and briefed an appeal to the U. S. Court of Appeals from the granting of that motion to dismiss;

(4) argued that appeal before a panel of the U. S. Court of Appeals twice;

(5) Argued that appeal before the U. S. Court of Appeals sitting en banc (110 U.S. App. D.C. 358, 293 F. 2d 835);

(6) filed an Amended Complaint;

(7) filed interrogatories;

(8) filed requests for admissions;

(9) taken depositions;

(10) filed motions to produce;

(11) opposed a motion for change of venue;

(12) moved to strike some defenses from Respondent's answer to the amended complaint;

(13) opposed a motion for summary judgment;

(14) moved for summary judgment;

(15) appealed to the U. S. Court of Appeals a second time in connection with a judgment entered against him on one of the two thrusts of his amended complaint;

(16) filed two petitions for certiorari with the Supreme Court of the United States;

(17) moved to vacate several orders entered below; and

(18) filed a mandamus with the U. S. Court of Appeals against Judge Walsh of the United States District Court.

Petitioner has also engaged in extensive litigation as a plaintiff-attorney in addition to the instant case and

to his duties with the Internal Revenue Service. In 1958, he filed a suit against Howard Johnson's in which he was counsel of record as well as Plaintiff. In that suit, Petitioner sought declaratory judgment and injunctive relief. He opposed a motion to dismiss and when it was granted, appealed to the United States Court of Appeals for the Fourth Circuit, and briefed and argued the case before that Court. *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845 (4th Cir., 1959).

When the Fourth Circuit ruled against Petitioner in that case, he again sued Howard Johnson's over a different, but similar, occurrence, this time in 1962 in the United States District Court for the District of Columbia. Upon motion for a change of venue that case was transferred to the United States District Court for the Eastern District of Virginia, Alexandria Division. There, the original complaint was twice amended (210 F. Supp. at 296). Then, as that Court later described it:

> "Pre-trial depositions were taken, interrogatories were propounded and requests for admissions were filed and answered by the respective parties. A pre-trial conference * * * was held at the request of the plaintiff." *Williams* v. *Howerd Johnson's Inc. of Washington,* 210 F. Supp. 295, 296.

The defendant then moved to dismiss and plaintiff moved for summary judgment. There was a hearing on the merits during which Petitioner successfully offered into evidence admissions he had secured prior to the hearing, 210 F. Supp. at 296. The Court then ruled against Petitioner on the merits.[1]

---

[1] In that case, Petitioner's theory was precisely the same as it is in the present case.

Petitioner then took that case[2] to the Fourth Circuit, where he again acted as his own counsel, 323 F. 2d 102 (1963). That Court remanded the case to District Court for a further hearing. A hearing below took place on April 1, 1964, and Petitioner again appealed to the Fourth Circuit, 342 F. 2d 727 (1965). In addition, during the last remand to the District Court in Virginia, Petitioner filed with the Fourth Circuit a mandamus against Judge Lewis. *Williams* v. *Lewis,* 342 F. 2d 727 (1965). This grew out of an attempt by Petitioner to amend, for a third time, his Complaint then before that Court. Then:

> "The District Court determined that, under the recited circumstances, the plaintiff's conduct in attempting further amendment was an abuse of the court's process and called for the visitation of sanctions upon the plaintiff, who is himself an attorney. The Court referred to our decision in Gullo v. Hirst, 332 F. 2d 178 (4th Cir., 1964), and to certain statements therein, ordered the plaintiff to pay to the court, within seven days, the sum of $100.00 and directed that counsel fees of $100.00 be taxed against plaintiff for defendant's counsel as a part of the costs assessed against plaintiff." (342 F. 2d 730).

The Fourth Circuit vacated these sanctions, even though:

> " * * * plaintiff's conduct of this litigation was such as to sorely try the patience of any court." (342 F. 2d at 730).

Petitioner then petitioned the Fourth Circuit for rehearing, and this was denied. (Vol. XXXII, Shep-

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[2] The two Howard Johnson cases involved two different alleged refusals to serve on two different dates.

hard's Federal Reporter Citations, No. 4, Feb. 1966, under 342 F. 2d 727).

There is another relevant bit of history in connection with this case. At one time in the present litigation, Petitioner was assisted by Phineas Indritz, Esq., a long-time member of this Bar. On September 19, 1960, Petitioner wrote the following letter to the Clerk of the United States Court of Appeals for the District of Columiba Circuit:

> "In re: Williams v. Hot Shoppes, Inc. No. 15,610
>
> "Dear Mr. Stewart:
>
> "This refers to the letter addressed to you by Phineas Indritz, Esquire, as 'Counsel for Appellant,' under date of September 16, 1960, rgarding a motion filed by me on September 14, 1960, in the above-entitled case.
>
> "This is to advise that Mr. Indritz was never employed by me as counsel at any stage in the prosecution of this case. I entered my appearance as appellant pro se counsel at the time the appeal was docketed and have been in charge of the litigation since it was commenced in District Court.
>
> "Mr. Indritz volunteered his services, has assisted me in the prosecution of this case, and was listed on the briefs filed herein as 'Of Counsel'. My understanding of the term, 'Of Counsel' is one who is employed to 'assist' in the litigation of a cause of action, 'or its presentation on appeal, but who is not the principal attorney of record for the party.' BLACK'S LAW DICT. (4th ed.) If Mr. Indritz entered an appearance as anything other than 'Of Counsel', the record is in error.
>
> "I regret that Mr. Indritz found it necessary to object to the motion filed by me since it consisted

merely of a request to file citations in support of oral arguments previously made by me before the Court.

"Very truly yours,

"/s/ CHARLES E. WILLIAMS.

"cc to:

Mr. Indritz
Mr. Steele
Mr. Carmody"

The sending of this letter apparently ended the participation of Mr. Indritz in this case.

Respondent respectfully submits that the following facts appear from the above recitation:

1. Petitioner is not a layman, but an experienced attorney and member of the Bar.

2. He filed three pro se suits in Federal District Courts in two different jurisdictions in the years 1958 and 1959.

3. In these suits, Petitioner employed, and showed familiarity with, practically every aspect of litigation in federal courts, including the filing of three complaints and at least three amended complaints; widespread discovery, including depositions, interrogatories, motions to produce and requests for admissions; oppositions to motions to dismiss complaints, motions for summary judgment, motions for change of venue, motions to strike interrogatories, and motions to dismiss appeal; appeals from final orders, interlocutory appeals, petitions for rehearings and petitions for certiorari; attempts to mandamus two different District Court judges; at least seven oral arguments before

District Court judges; five oral arguments before three judge panels of two different Appellate courts; and one oral argument before a nine-judge Court of Appeals sitting en banc.

4. Despite the fact that Petitioner had cases in litigation in two different federal court systems at the same time, he disassociated himself from Mr. Indritz, thus assuming the entire load of the instant litigation. *After* all this, he let one full year elapse, from October 1964 to October 1965, without doing *anything* in the instant case.

What we have here is an experienced lawyer who either wanted to delay the instant case in the hope some Supreme Court opinions would come down which would be helpful to him, (See Petitioner's brief, page 4, third full paragraph), or who, after flooding the District Court and the Court of Appeals with complaints, amended complaints, motions, appeals, etc., for just one month short of five years, then let a full year go by, without inquiry of any kind to the Clerk of the District Court and without doing anything whatsoever to advance the litigation.

Under these circumstances, Respondent submits that it just cannot be said that the Pre-Trial Examiner and the District Judge who adopted the recommendations of the Pre-Trial Examiner, abused their discretion in dismissing the case under Rule 13 and in refusing to re-instate it.

II

The District Court Had the Power To Dismiss the Case, and Did Not Abuse Its Discretion in so Doing

It is clear that a United States District Court has inherent power to dismiss an action for want of prosecution, whether under Local Rule 13 of the Rules of the District Court for the District of Columbia (or its equivalent,) or otherwise. *Slavitt* v. *Meader,* 107 U.S. App. D.C., 396, 278, F. 2d 276, and cases cited therein.

Petitioner must show an abuse of discretion by the Court below in order to merit a reversal. *Slavitt* v. *Meader, supra; Barger* v. *Baltimore & Ohio R. Co.,* 75 U.S. App. D.C. 367, 368, 130 F. 2d 401 (1942).

As stated at 24 Am. Jur. 2d, Dismissal, Discontinuance and Nonsuit, § 59:

> "In the absence of any statute or rule of Court guiding its action, the question is addressed to the sound judicial discretion of the trial court, whose ruling will not be disturbed in the absence of anything to indicate abuse of discretion in this respect."

In the instant case, where there is a clear rule of court, where the Petitioner is himself the attorney and a member of the Bar, and where the Petitioner allowed almost twice the time permitted in the rule to elapse, there is much less reason for disturbing the ruling of the trial court, and so the Court of Appeals decided in its action which Petitioner now seeks to review. As stated in *Steele* v. *General Baking Co.,* 101 A. 2d 845, 846, (D.C. Mun. Ct. of Appeals, 1954):

> "There is a duty on every plaintiff to be diligent in pursuing his remedies and to expedite his cause to a final determination."

In a case such as the present, where there is no innocent plaintiff to be hurt by his attorney's lack of diligence, the rule applies with greater force.

The truth of the matter is that the record discloses an experienced lawyer apparently working normal working hours as a government attorney and trying to conduct three involved pro se actions, in both trial and appellate courts, on the side, and getting rid of what Petitioner himself describes as "volunteer" help from another lawyer. Petitioner bit off more than he could chew. When in so doing he fails to abide by Court rules it does not add up to an abuse of discretion below if his action is dismissed, remembering always that it was an entire year which elapsed without *any* action by Petitioner.

III

There Is No Conflict in Circuits

There is no conflict of circuits involved in this case.

First, it is an abuse of discretion with which we are dealing. It is perfectly obvious that the discretion of the many District Court judges in the country is not identical, and when it varies, as it must, it does not add up to a conflict in circuits. When an abuse of discretion is involved each case must stand on its own facts. In the present case the sense of discretion of a pre-trial examiner, a District Court judge, and three judges of the United States Court of Appeals for the District of Columbia Circuit have all led them to conclude, unanimously, that Petitioner's failure to abide by the rules of court warranted the dismissal of his action.

Secondly, the cases cited by Petitioner in his brief certainly do not indicate a conflict in circuits. In

Woodham v. *American Cystoscope Co.*, 335 F. 2d 551 (4th Cir. 1964) cited by Petitioner at pages 5 and 6 of his brief, the following facts appear:

1. The plaintiff was not herself an experienced member of the bar. (at 552).

2. The plaintiff's attorney was not a member of the bar of the Court where the case was tried, but was a lawyer from another State (at 553).

3. The District Court gave as its main reason for dismissal the failure of counsel to comply with an impossible condition. As stated by the Court of Appeals (553):

> "In its order, the court referred to the violation of *another* local rule, Rule 20(a) as the 'primary' reason for denying the motion:
>
> " 'This Court is denying the motion to set aside said Order of Dismissal, *primarily because of the continued violation by plaintiff's counsel of Local Rule 20(a) of this Court, which requires counsel to perfect service on defendants within sixty (60) days from the date of filing.* This action was filed March 13, 1963, and now almost ninety (90) days after that date service has not been perfected upon American Cystoscope Makers, Inc. (erroneously named by plaintiff as The American Cystoscope Company of Pelham, N. Y.).'
>
> "We observe, in passing, that the plaintiff's counsel could not perfect service until reinstatement of the complaint."

4. The Woodham case *specifically* was not dismissed for want of prosecution or its equivalent. See 335 F. 2d at 556.

None of these factors is present in the instant case where

1. The Petitioner is an experienced lawyer.

2. The Petitioner is a member of the bar of the court whose rule is involved.

3. There were no impossible conditions for Petitioner to comply with.

4. The case was dismissed because Petitioner allowed one full year to elapse without taking any steps whatsoever.

These same important distinctions also distinguish this case from others cited by Petitioner.

L. P. Steuart, Inc. v. *Matthews,* 117 U.S. App. D.C. 279, 329 F. 2d 234, Cert. denied, 379 U.S. 824 (1964) cited by Petitioner at Page 7 of his brief, is a case in which the Court of Appeals *upheld* the discretion of the lower Court, not reversed it. This case stands for the proposition that an Appellate Court will not lightly overrule a trial court on a matter such as this which is committed to the discretion of the trial court.

IV

There Is No Innocent Litigant Involved Here

In many cases, some of which are cited by Petitioner, cases have been reinstated because courts were reluctant to impute the negligence of an attorney to the litigant. See for example, *L. P. Steuart, Inc.* v. *Matthews, supra.* In the present case, there is no innocent client to suffer because his lawyer did nothing for a year. Lawyer and client are one and the same. In a matter such as this, involving the discretion of the trial court,

the fact that Petitioner is an exprienced lawyer is surely a factor to which the courts below were entitled to give great weight.

V

Fact Petitioner Tried To Conduct This Litigation in His "Spare Time" No Excuse

Petitioner, in his Affidavit filed below and generally throughout this case, blames his heavy schedule of litigation

> ("* * * the plaintiff has for the past several years maintained one of the heavier dockets of cases in the Refund Litigation Division of the Chief Counsel's Office. Secondly, the plaintiff concentrated during *spare* time upon the prosecution of [his] Howard Johnson's case," (JA 16)). (Emphasis added.)

and the press of personal affairs for his inactivity. A similar contention was made, and rejected, in *Darlington* v. *Studebaker-Packard Corporation,* 261 F. 2d 903 (7th Cir. 1959). In that case, counsel had a heavy burden of work, so that even if he had not overlooked the local equivalent of our Rule 13, "it would not have been possible anyhow to take such action within said time." The Court of Appeals rejected this argument saying it did not provide a basis for holding the trial court had abused its discretion in denying a motion to reinstate. The hard truth of the matter is that it is extremely difficult, if not impossible, to conduct litigation in two different jurisdictions on the side, or as Petitioner puts it in his affidavit, during "spare time." When one attempts it in his "spare time," it is hardly an abuse of discretion for the court to insist that its reasonable rules be obeyed.

VI

CONCLUSION

In view of Petitioner's experience in Court as a member of the Bar, his undisputed failure to follow the rules of Court, and the fact that he let one full year go by without taking any action in this case, it was not an abuse of discretion for the District Court to dismiss the case and to deny a motion to reinstate it. Petitioner's brief presents no conflict in Circuits, as set forth above. Respondent, therefore, requests the Petition for a Writ of Certiorari be denied.

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